

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 DISABLED IN ACTION,

4 Plaintiff,

5 v.

16 CV 8354 (VEC)

6 CITY OF NEW YORK, et al.,

7 Defendants.

8 -----x
9 New York, N.Y.
May 5, 2017
10:35 a.m.

10 Before:

11 HON. VALERIE E. CAPRONI,

12 District Judge

13 APPEARANCES

14 DISABILITIES RIGHT ADVOCATES
15 Attorneys for Plaintiffs
16 BY: MICHELLE ANNE CAIOLA
REBECCA JULIET RODGERS

17 NEW YORK CITY LAW DEPARTMENT
18 OFFICE OF THE CORPORATION COUNSEL
19 Attorneys for Defendants
20 BY: STEPHEN EDWARD KITZINGER
CAROLYN ELIZABETH KRUK
21 MARK GALEN TOEWS
22
23
24
25

1 (Case called)

2 THE COURT: You are?

3 MS. RODGERS: Rebecca Rodgers.

4 MS. CAIOLA: Michelle Caiola.

5 MR. TOEWS: Mark Toews.

6 MS. KRUK: Carolyn Kruk.

7 MR. KITZINGER: Steven Kitzinger.

8 THE COURT: Let me say that I was really hoping that
9 the parties would be much closer on how to proceed with this
10 case. Let me start with my question to the plaintiffs.

11 Why do you need to survey 25 police precincts? As you
12 told me last time, it strikes me that the critical path issue
13 is whether the city has to make all of its precincts accessible
14 or whether it can provide access to its programs with less than
15 100 percent accessibility. Correct?

16 MS. CAIOLA: Yes. That's part --

17 THE COURT: Isn't that the critical path issue? The
18 reason I say it's critical path is if I rule against you on
19 that and I say, no. It doesn't have to be 100 percent, then
20 we're in a different sort of branch, which is okay. Do they
21 have enough accessibility that they provide access to their
22 programs.

23 That may yield different discovery than if I agree
24 with you that 100 percent of the precincts have to be
25 accessible in order for them to comply with the ADA.

1 MS. CAIOLA: Let me start with the fact that our
2 second cause of action is under the New York City Human Rights
3 Law, and there is no program accessibility defense there at
4 all. Under the New York City Human Rights Law, every facility
5 needs to provide access.

6 THE COURT: Of course, if I found against you on the
7 ADA, I might decide not to keep the city claim.

8 MS. CAIOLA: Understood. Under the ADA as well, while
9 program access is a defense, they're not going to prevail in
10 this case for several reasons. One is they're not going to be
11 able to show that it's a program access, meaning that there's
12 something they're providing over all that's not specific to the
13 precincts.

14 THE COURT: That's your position. They have a
15 different position.

16 MS. CAIOLA: That's our position. I mean, why would
17 there be 77 precinct houses? Have you ever tried to report a
18 crime at a station and they tell you you have to go somewhere
19 else.

20 THE COURT: You're trying to argue the merits. I'm
21 trying to figure out how we can cut to the chase. Because if
22 you're right, then don't you want to get them on the path to
23 making these stations accessible sooner rather than later?

24 MS. CAIOLA: Absolutely. If we could go into a
25 settlement mode where we all knew we were settling it because

1 they were going to allow a survey of all stations and undergo
2 remediation to make each station accessible --

3 THE COURT: If they want to surrender.

4 MS. CAIOLA: Every public entity was charged with
5 creating a self-assessment and transition plan to bring
6 themselves into compliance. Every program, every department.
7 They have not. At least they haven't produced one.

8 THE COURT: That's why you sued them.

9 MS. CAIOLA: That's part of why we sued them. It just
10 goes to show that we're going to need to proceed and show how
11 inaccessible every station is.

12 THE COURT: No, you don't.

13 MS. CAIOLA: We're talking about surveying one third
14 of the stations. We think we're going to need that to prove
15 our legal point, how inaccessible they are.

16 THE COURT: Why?

17 MS. CAIOLA: Because they want to say they don't need
18 to have every station accessible. We're going to show you
19 there are adjacent precincts, and there are miles and blocks
20 between accessible stations.

21 They can't possibly be providing program accessibility
22 by having a station here or there that's accessible. I don't
23 know how we show that without showing the level of
24 inaccessibility, unless they want to stipulate to it.

25 THE COURT: What I'm suggesting is to try to take a

1 baby step, which if I agree with you, is going to make their
2 situation -- they're going to have to come to the table and
3 talk settlement.

4 Because if I say they're wrong about that they can
5 provide less than 100 percent accessibility under the ADA, as
6 long as they provide program accessibility, if I say no, the
7 law says you have to provide all the precincts have to be
8 accessible. They then either have to appeal or have to talk
9 settlement.

10 Now, I feel like this is Groundhog Day. This is the
11 same conversation we had a month ago. If that's the case, I'm
12 not sure why you need a whole lot of discovery on that discreet
13 legal issue, which is critical path, because if they lose that
14 issue, they're going to be willing to talk settlement.

15 Because then what we're going to be talking about is
16 what is the plan to move from where we are, which is some
17 percentage of precincts are not accessible, to where they need
18 to be, which is 100 percent of all precincts have to be
19 accessible.

20 On the other hand, if I agree with them and say, no.
21 As long as they are providing program accessibility, they are
22 in compliance with the ADA, then your discovery is focused on
23 the very issues you just laid out to me, which is what is the
24 program of the police department and even accepting their
25 crabbed interpretation of the ADA, they're still not in

1 compliance because there are precincts that have miles and
2 miles and miles between accessible stations. That's an
3 entirely different set of discovery.

4 I am baffled by why you want to enter into what's got
5 to be a very costly undertaking of surveying 25 police
6 precincts before we tee up that critical issue.

7 MS. CAIOLA: So, if I understand you, we're concerned
8 about having enough evidence to show that even if they were
9 allowed to provide program accessibility, that they are not.

10 THE COURT: I don't want to litigate that yet.

11 MS. CAIOLA: So you would like us to do dispositive
12 motions on the issue of what the program is? Am I getting that
13 correct?

14 THE COURT: No. It would be their motion actually, I
15 suppose.

16 Your position is you don't have to provide 100 percent
17 accessibility under the ADA; right?

18 MR. TOEWS: Correct, your Honor. Yes.

19 THE COURT: And that you are providing program access.

20 MR. TOEWS: Yes, your Honor.

21 THE COURT: There's going to need to be discovery for
22 that.

23 MR. TOEWS: I believe there would need to be some
24 discovery, yes. Just to be clear, we are prepared and ready,
25 as we indicated in our letter, to discuss settlement now. That

1 was our and is our proposed approach, was that we would simply
2 perhaps -- perhaps "simply" is the wrong word -- but enter into
3 some sort of structured negotiations with plaintiffs whereby we
4 acknowledge that although our position is that we are providing
5 overall program access, that certainly there needs to be some
6 remediations and fixes made to ensure that there are a
7 sufficient number of physically accessible station houses
8 geographically dispersed throughout the city.

9 THE COURT: I don't think they're willing to negotiate
10 on that basis.

11 Are you? At this stage.

12 MS. CAIOLA: We don't know what's out there. That's
13 partly why we're looking. So it would be very hard. How would
14 we agree on how many stations need to be accessible and which
15 can be made accessible and which cannot be, which you've looked
16 at? We haven't seen any self-assessment. We haven't seen any
17 transition plan. So we don't know what they would be
18 contemplating.

19 MR. KITZINGER: If I may, your Honor. I think we
20 could look at maps of each patrol burough, come up with a plan.
21 As part of the settlement discussion, we could come up with a
22 plan, identify the station houses that either are or will be
23 made accessible, and have appropriate policy procedures put in
24 place, if they're not already in place, to allow for program
25 access through the use of the identified station houses.

1 If we said a station house we identified cannot be
2 reasonably made accessible, we would substitute one or more
3 station houses to ensure accessibility. That would go a long
4 way towards making any of the surveys done useful going forward
5 and trying to resolve the case more in the global sense.

6 THE COURT: Let me make sure I understand. You're
7 proposing that you would be willing to talk settlement on a
8 less than 100 percent accessibility.

9 MR. KITZINGER: Yes, your Honor.

10 THE COURT: Are you prepared to talk settlement on
11 that as kind of a core base understanding?

12 MS. CAIOLA: No, your Honor. Each precinct is unique,
13 geared towards each neighborhood.

14 MR. KITZINGER: Your Honor, as I recall, last time we
15 were here, Mr. Wolinsky acknowledged that it's likely that
16 given the age of these buildings, more likely than not, one or
17 more will not be able to render it accessible due to technical
18 infeasibility, undue burdens of cost.

19 Therefore, once they've acknowledged that, it's
20 suggested program access can be provided through less than
21 100 percent accessibility, I think the regulations promulgated
22 by DOJ under the Rehab Act explicitly provide that program
23 access may be achieved through means other than making
24 100 percent of every facility accessible by having certain
25 programs in certain locations and other mechanisms.

1 That is what we believe the law requires. That is
2 what we're prepared to do, to the extent we're not already
3 there. We would like to move forward on that track because we
4 believe to the extent program access is not presently provided,
5 although we believe it may well be, it would achieve that goal
6 much more rapidly than going down the road of surveying all the
7 station houses in an effort to allow plaintiffs to obtain
8 evidence for a summary judgment motion.

9 MS. CAIOLA: The legal obligation was to already have
10 surveyed all the houses and to have a transition plan to make
11 as many that could be brought into compliance into compliance.
12 Clearly that has not happened. So it's very hard for the
13 plaintiffs to believe that that's going to happen under some
14 kind of settlement where we don't understand the level and
15 extent of the inaccessibility.

16 MR. KITZINGER: Your Honor, if your autograph is on a
17 document, I think it's pretty clear that the police department
18 of the city of New York will comply with its terms and
19 obligations. I think suggesting otherwise is somewhat
20 disingenuous.

21 THE COURT: I don't have any problem believing that if
22 you entered into a stipulated agreement settling this case that
23 was so ordered and I maintained jurisdiction and had periodic
24 reports on how the city was doing, that they wouldn't comply
25 with it.

1 If they fell out of compliance, I have complete
2 confidence that I would have a lawyer from your organization in
3 front of me jumping up and down. So I'm not too concerned
4 about getting them into compliance.

5 What I am concerned about is sending you off for a
6 settlement with the magistrate judge if there is not
7 willingness on both sides to talk based on the general
8 parameters that the city has laid out.

9 MS. CAIOLA: I don't understand how we would arrive at
10 the point to decide which stations they were going to make
11 accessible if they weren't surveyed. We've resolved these
12 cases before with the city once regarding polling places, the
13 Board of Elections.

14 We just had a three-year period of remediation renewed
15 because we've had to go through this process after winning our
16 motion to have the polling places surveyed, remediation
17 suggested -- we're in the process of reviewing whether they're
18 being done. It's a very long process, but that is what it's
19 going to take.

20 We're not willing to just put it in their hands to
21 say, apparently they don't have the information of what's
22 feasible or not because they haven't produced it. If we had a
23 self-assessment and a transition plan, I think we could start
24 from there, but we don't. We have nothing.

25 MR. KITZINGER: Your Honor, if I may. With regard to

1 the polling place litigation, there are 1,200 locations. In
2 that instance, you are required to vote in your own polling
3 place because you have a ballot which is specific to where you
4 reside. That's a very different situation than you have here.
5 There's also a much greater number. There's much less control
6 over the facilities.

7 THE COURT: Let me ask you something. In that
8 litigation did you survey all 1,000 polling places before you
9 moved for summary judgment?

10 MS. CAIOLA: No.

11 MR. KITZINGER: That's the reason the Board of
12 Elections consented to extending jurisdiction, because the
13 third-party expert who is surveying the facilities has not yet
14 completed all the surveys because there are so many and it
15 takes a long time.

16 As I said before, your Honor, what we suggest is we
17 identify the station houses, and to the extent the station
18 houses cannot be rendered accessible reasonably, another
19 station house would be selected to be made accessible so that
20 nobody would have to travel too far.

21 THE COURT: So you would start out the settlement
22 discussions saying these are the 20 precinct houses or
23 whatever.

24 MR. KITZINGER: We would sit down with a map and
25 jointly select them. We could put them together. We could

1 come up with a plan. They could opine on it. We think maybe
2 moving forward under the guidance of a magistrate judge would
3 expedite that process. I think it's Magistrate Judge Peck. He
4 usually moves things along very quickly.

5 MS. CAIOLA: Our plaintiffs have stories. A child --

6 THE COURT: No. Are you willing to enter into a
7 discussion on those basic parameters or not? Quit trying to
8 sell me your case. I understand your case. I'm sympathetic to
9 your case, but you're annoying me.

10 I'm trying to get from where we are now to where
11 either you win your basic point that 100 percent have to be
12 accessible or they prevail on their basic point, which is they
13 don't have to be 100 percent accessible.

14 You don't have to keep selling me on disabled people
15 ought to be able to get into the police precinct. Are you
16 willing to discuss a settlement on the basic parameters that
17 the city has laid out?

18 MS. CAIOLA: Respectfully, your Honor, we would
19 request to be allowed to engage in the discovery practice of
20 figuring out --

21 THE COURT: So no.

22 MS. CAIOLA: -- the level of accessibility.

23 THE COURT: So no.

24 MS. CAIOLA: We're not willing to take a list of 20
25 self-selected stations --

1 THE COURT: That is not what he said. What he said is
2 he's willing to sit and talk. You can both pick precincts.
3 That's about as collegial and as collaborative a proposal as
4 I've heard from the city. So either you're not listening or
5 you don't want to be collaborative on this.

6 MS. CAIOLA: We would like the city to proceed with
7 making every police station accessible to the extent feasible.

8 THE COURT: I hear that they are uninterested in
9 talking settlement.

10 Why do you need 25?

11 MS. CAIOLA: That's approximately one third, and it
12 addresses the program accessibility issue. If they're going to
13 provide program accessibility, they're going to need a certain
14 percentage of the precincts that are accessible.

15 THE COURT: Do you have a view on the 25? It seems
16 like an awful lot to me.

17 MR. KITZINGER: Your Honor, it seems like a lot. We
18 don't know how they intend to select them. It's been indicated
19 to us previously that they intend to select them from gathering
20 evidence from their summary judgment motion as opposed to
21 identifying whether it's program access in a more global sense.

22 THE COURT: I'm sorry. I did everything within my
23 power to try to get to a cheaper way.

24 MR. KITZINGER: Absolutely, your Honor.

25 THE COURT: Trust me. I will remember this in

1 attorneys' fees litigation, that you have chosen not to go a
2 route that may be more efficient and speedier. That's not what
3 you want to do. My question is: Your letter told me that
4 there was a selection of 25. Has that selection been given to
5 the city?

6 MS. CAIOLA: Yes, and they agreed. On the stations,
7 no. But they agreed to 25.

8 THE COURT: I didn't see an agreement to 25.

9 MS. CAIOLA: The parties agreed to 25.

10 MR. KITZINGER: Your Honor, they served a notice to
11 enter and inspect. We did not move to quash it completely. We
12 objected to it. Your Honor has indicated that some level would
13 need to be made available to inspect. If they are insisting on
14 25, I don't know that we can --

15 THE COURT: It seems excessive to me.

16 Have you agreed on an expert yet?

17 MS. CAIOLA: I do not believe we can agree on one. We
18 have passed names. They believe our experts -- they don't find
19 them acceptable, and their experts are basically doing many
20 projects for the city.

21 MR. TOEWS: That's not how we view it. We thought
22 that we had an agreement with plaintiffs' counsel that we would
23 each designate two additional conflict-free experts and propose
24 them to each other, which we did. We proposed two. We were
25 told that they essentially didn't like our choices.

1 There was no conflict. Mr. Wolinsky said he didn't
2 think it would be good for plaintiffs' case essentially. So it
3 seems like we're probably not going to be able to agree on a
4 joint expert.

5 MR. KITZINGER: There's another issue. Plaintiffs
6 indicated that they intend to unilaterally select the station
7 houses to be surveyed without input or involvement from
8 defendants.

9 We did not think that would be an appropriate use of
10 city funds, to survey random station houses without an eye to
11 obtaining usable information to the extent that station houses
12 need to be remediated to be made accessible because we can be
13 surveying ones that are simply not part of a program access
14 plan.

15 THE COURT: I'm not sure that I understand that.

16 MR. KITZINGER: As I suggested, an approach of
17 settlement and resolution of this matter is we would identify
18 station houses that would provide program access. Those would
19 be the ones that we would survey.

20 THE COURT: They disagree with that whole premise.

21 MR. KITZINGER: Plaintiffs have not indicated how they
22 intend to identify which station houses are to be surveyed
23 except that they intend to choose them to obtain the best
24 evidence for their summary judgment motion.

25 THE COURT: Right. That would normally be a

1 plaintiff's approach.

2 MR. KITZINGER: To the extent that we believe we're
3 going to do it jointly, we should be involved in the selection
4 process. We should select them with an eye towards a map to
5 provide program access.

6 To the extent that remediation needs to be done at one
7 or more of the station houses, we would then have the
8 information and be able to attack the problems and remove the
9 barriers that were identified.

10 THE COURT: They seem more interested in litigating
11 than getting to a speedy resolution.

12 MR. KITZINGER: Unfortunately, that seems to be the
13 case, your Honor.

14 THE COURT: If you think that there are precinct
15 houses that are not on their list that are going to be useful
16 to you in arguing that we can provide program access because
17 there are these 20 precinct houses that the plaintiffs didn't
18 look at, then that's what you put forward.

19 MR. KITZINGER: Absolutely, your Honor. We're going
20 to have to do that.

21 THE COURT: I think you're going to have to do that.
22 It's unfortunate that the parties cannot agree on an expert.
23 It would be extremely useful to the Court if there is a single
24 expert that is acceptable to both sides.

25 MS. CAIOLA: Your Honor, the experts that defendants

1 put forth are working on defense matters for the city.

2 THE COURT: I thought they said they put forward two
3 that are not working on anything for the city.

4 MR. KITZINGER: That's not true, your Honor. In fact,
5 one of the experts we put forward I believe was the architect
6 on this building, this renovation.

7 MS. CAIOLA: Urban Architects is representing you
8 regarding the inaccessibility of Rikers Island and worked
9 closely on other matters. The Stephen Jacobs Group has been
10 doing work with you on city libraries and schools.

11 In other words, this is someone that the city goes to
12 often. So they have an intent to remain someone that you
13 employ. That creates a conflict. You've used the same
14 regarding ours. We have perfectly good, qualified experts that
15 worked on both sides of the table. We would welcome taking a
16 second look at our experts.

17 MR. TOEWS: The issue with the expert that the
18 plaintiff proposed was that there was an active conflict. They
19 were serving as an expert for plaintiffs in a case where they
20 were opposing, where they were adverse to the city in an active
21 case. That's different than saying that they have done work
22 for the city at some point in the past.

23 MS. CAIOLA: They surveyed the sidewalks, the work was
24 done, and it was submitted with a summary judgment motion to
25 say that the sidewalks are not in compliance. That's not

1 really active work. They did a project for us.

2 THE COURT: I'm going to make one last pitch. Why
3 don't you pick your favorite expert, you pick your favorite
4 expert, and charge them with picking a third expert that they
5 both like. Consider that one.

6 MS. CAIOLA: Charge our experts? I'm sorry. I
7 misunderstood.

8 THE COURT: You ask your favorite expert and they ask
9 their favorite expert to meet with each other like picking a
10 neutral arbitrator. They pick a third party who is acceptable
11 to both of them.

12 MR. TOEWS: We will certainly talk to our clients
13 about that. I know they had some misgivings about sharing an
14 expert in the event that we would not have input into the
15 locations of the precincts that were surveyed.

16 THE COURT: I see those as different issues.

17 MS. CAIOLA: How about the expert that's doing the
18 surveys in the Board of Elections case? Our parties have
19 agreed to use that.

20 MR. KITZINGER: We haven't contacted them to see if
21 they even have the capacity to do the poll sites and the
22 shelters.

23 MS. CAIOLA: If it's 25 stations, and it's the public
24 areas. It's entrances, bathrooms, lobby areas, interview
25 rooms. It's not a large lift. We could check that out.

1 THE COURT: Would that person be acceptable to you?

2 MS. CAIOLA: Yes.

3 THE COURT: If that person would also be acceptable to
4 the city, check and see if he can do it or she or it.

5 MR. KITZINGER: We will check with our clients.

6 THE COURT: If not, you've got a week to let the
7 plaintiffs know whether that expert is acceptable. Otherwise,
8 you're on your own. You're each going to hire your own expert.
9 Again, lots of money that seems to me not the best way of
10 spending money. So be it. One week on that.

11 What's the story with production of documents?

12 MR. TOEWS: We supplemented our response yesterday,
13 your Honor. We were waiting for the protective order to be
14 signed.

15 THE COURT: It was signed a couple days ago.

16 MS. KRUK: They've been produced.

17 MS. CAIOLA: Although, your Honor, they are schematics
18 and diagrams and construction documents. We have yet to
19 receive documents such as assessments, transition plans,
20 complaints regarding accessibility, etc. We have no
21 communications at all, even though we've been in discussions
22 with them.

23 THE COURT: What do you mean you have no
24 communications at all?

25 MS. CAIOLA: There is nothing indicating that there's

1 been any conversation around access. We know our plaintiffs
2 have provided complaints, that there have been back-and-forth
3 on these issues.

4 THE COURT: What's the story?

5 MR. TOEWS: We did do a search of complaints. It did
6 reveal an enormous amount of documents. It took a very long
7 time to go through. It was a search of all of the IAB files.
8 We used keywords. It turned up I believe 8,000 IAB files.

9 THE COURT: This is in internal affairs?

10 MR. TOEWS: Yes, your Honor. I was surprised to learn
11 that myself. I understand a complaint of any nature, whether
12 it's against a member of service or whether or not it's
13 accessibility, goes through internal affairs.

14 So it has been extremely time consuming. I would like
15 to have a conversation with plaintiffs and see if we can agree
16 on some revised search terms to try and narrow down the
17 results.

18 MR. KITZINGER: Your Honor, I would absolutely
19 question the need for such documents. We think it's excessive,
20 given the burden locating them, identifying them, producing
21 them, given the fact that they will be surveying. That's where
22 the rubber hits the road.

23 THE COURT: Why are they relevant if people have
24 complained?

25 MS. CAIOLA: I believe this is going to go to program

1 access and what is provided at each precinct and how it is
2 unique and related to each neighborhood and the population of
3 each neighborhood that the precinct is in.

4 THE COURT: The complaints don't go to the population.

5 MS. CAIOLA: It's going to go to what they were
6 attempting to access. For example, one of our plaintiffs was
7 upset that she couldn't go to the community neighborhood
8 meetings that were held there on the second floor without an
9 elevator. So you're going to get those sorts of complaints.
10 She wrote letters.

11 THE COURT: But you're going to survey these. So you
12 will find out that there was no elevator and, therefor, that
13 any meeting that was held on the second floor is not
14 accessible. Why do you need the complaint?

15 MS. CAIOLA: Because they are going to argue that it's
16 okay to have dispersed precincts accessible without having them
17 all be accessible, and the complaints show why it's important
18 to be able to get into a particular precinct, the various
19 situations that occurred regarding not being able to get into
20 that building that's providing the program of police protection
21 per neighborhood.

22 MR. TOEWS: I think there's discovery that will
23 demonstrate that in other ways. They've indicated they intend
24 to take depositions. Of course, we have no objection to that.
25 That issue is more what programs are offered at each precinct.

1 If somebody claims the entrance is not accessible,
2 again, that will be demonstrated through the survey. It's a
3 fact. Either it's accessible or it's not. Notice is not an
4 issue in this case. Whether or not somebody has complained I
5 don't believe really is an issue.

6 MS. CAIOLA: The harm being done to the class is being
7 shown through incidents that have occurred.

8 MR. KITZINGER: They can testify that they attempted
9 to get into a meeting and such meeting occurred.

10 MS. CAIOLA: We don't have the names of those people.

11 THE COURT: But you know who your plaintiffs are. You
12 know what their complaints are.

13 MS. CAIOLA: This is a class case. So it would also
14 provide additional information and additional incidents that we
15 are not yet aware of across boroughs.

16 THE COURT: How much burden is associated now that
17 you've got it down to 8,000?

18 MR. TOEWS: There were 8,000, yes. They've been going
19 through them within an IAB file trying to find a reference to
20 the complaints. I understand it's very time consuming.

21 THE COURT: Are they electronic?

22 MR. TOEWS: They are electronically stored.

23 MS. KRUK: That's narrowed. Now it's going one by
24 one, unless we can narrow the search terms that we've used even
25 further. So we can talk to plaintiffs about that. We're not

1 getting much of a bang for our buck for 8,000. It's just too
2 much.

3 MR. TOEWS: I understand that the complaints that
4 they've located so far, two, were plaintiffs in this case.

5 THE COURT: Two out of how many documents they went
6 through?

7 MS. KRUK: 4,000.

8 MS. CAIOLA: These are named plaintiffs representing
9 the class, which is every citizen and visitor in the city.
10 We're talking about the largest law firm in the country.

11 THE COURT: They found 2 out of 4,000.

12 MS. CAIOLA: We're talking about the named plaintiffs.

13 THE COURT: I thought they found two complaints about
14 access.

15 MS. KRUK: So far, yes.

16 MR. TOEWS: I was just trying to make the point that
17 it does seem a bit of a futile exercise to comb through
18 thousands of IAB files to identify the plaintiffs in this case
19 who have indicated that they have made a complaint.

20 THE COURT: This seems you've got a proportionality
21 problem. What were the search terms?

22 MS. KRUK: It was a list of 12 terms. I don't have
23 them handy, but they were things like access, ramp, disability,
24 Americans With Disabilities Act, wheelchair, those things.

25 We've tried to be targeted but broad enough to capture

1 accessibility issues. It's brought up a lot of obviously not
2 relevant documents that we'd prefer to expend the number of
3 hours that would be required to continue to search on something
4 better, or if we can narrow the terms still, then fine. We'll
5 turn over the two that we've found, but we're hoping to
6 eliminate some of the hours.

7 THE COURT: Talk to the plaintiff. Talk to each
8 other. If you can't reach an agreement, come back to me
9 because I think there's a serious proportionality problem if
10 4,000 documents yield 2 that are responsive, 2 that you already
11 knew about.

12 MS. CAIOLA: May we also narrow down whether there
13 have been assessments and surveys of the stations.

14 THE COURT: Have there been any assessments?

15 MR. TOEWS: Yes. We have provided a list of the
16 assessment that was done of the precincts.

17 MR. KITZINGER: The only documents we've been able to
18 identify from assessments are summary charts. These
19 assessments were done five years ago by an employee who is no
20 longer with the department.

21 We don't know how the survey exactly was done, whether
22 it was just a checklist, yes. This is an accessible bathroom.
23 Yes, there's an elevator and whether there is anything more
24 than that because no such documents have been located at all.

25 THE COURT: Have you turned over whatever you have as

1 to those assessments?

2 MS. CAIOLA: So that two-page document is the only
3 document you have about feasibility and accessibility?

4 MR. KITZINGER: That we've identified to this date.

5 THE COURT: You proposed that you were going to survey
6 25 precincts by the middle of June. That doesn't seem
7 realistic to me. I like short schedules, but that just doesn't
8 seem realistic.

9 MS. CAIOLA: We spoke to our expert, and they believe
10 they can do multiple stations per day. We didn't even schedule
11 it that way. If we do 25 and do one a day, we think that
12 should absolutely work.

13 MR. TOEWS: That seems very ambitious to us as well.
14 We certainly would not have the capacity or the ability to do
15 more than one per day. Even one per day seems very ambitious.
16 As Mr. Kitzynger said, we do have experience with plaintiffs'
17 counsel.

18 THE COURT: Who do you send when the survey is being
19 conducted?

20 MR. TOEWS: At least initially we would like to be
21 present, the law department. The police department will
22 designate. I believe it's in the protective order that the
23 police department will designate a liaison or an escort who
24 will accompany the expert throughout the station houses to
25 those areas that offer programs to the public. We will ensure

1 that it runs smoothly and that there is somebody who can escort
2 the surveyor.

3 It's obviously a very detailed survey. It's not
4 simply eyeballing it. They need to take very precise
5 measurements with a level and tape measure and take
6 photographs.

7 THE COURT: About how long do these surveys typically
8 take?

9 MS. CAIOLA: I can't imagine it would be more than two
10 to three hours. Each station is unique.

11 THE COURT: You think it's more than that?

12 MS. KRUK: Based on the experience we have in our BCID
13 litigation --

14 THE COURT: Which BCID?

15 MS. KRUK: It involved a challenge to the city's
16 emergency planning and the shelter system for evacuations. So
17 they're surveying portions of a lot of DOE facilities and
18 schools.

19 It's been very time consuming arranging access and
20 walking them through and making sure they're surveying the
21 right areas -- not that bathroom, this bathroom, all the rest
22 of it. I think at least in the beginning, it's going to take a
23 lot longer. Then maybe once we get a better idea of the
24 process, we could do more.

25 MS. CAIOLA: Even if it is one a day.

1 MS. KRUK: We'll certainly aim for that, but day after
2 day after day.

3 MR. TOEWS: Sometimes they need to return to a
4 facility. They need time to generate the reports.

5 MS. CAIOLA: We could do it for a few weeks and see
6 how many we could get through. I think getting access is going
7 to be the main concern on plaintiffs' part.

8 THE COURT: Your surveys of the police stations are
9 going to be due by the end of the summer. So by September 1.
10 Work out the schedule between you so that you can get 25 done
11 by the beginning of September, which strikes me as doable.

12 MR. KITZINGER: Yes, your Honor.

13 THE COURT: Then you want to take depositions. Is
14 that correct?

15 MR. TOEWS: Yes, your Honor.

16 THE COURT: Both sides?

17 MR. TOEWS: Yes. I believe we would like to take some
18 depositions.

19 THE COURT: You want to take three depositions? Is
20 that right?

21 MS. RODGERS: That's correct, your Honor.

22 MS. CAIOLA: We were talking about initially in
23 preparation for a dispositive motion.

24 THE COURT: That's what I'm talking about.

25 MS. CAIOLA: If we're looking at this case broader --

1 THE COURT: No broader. A dispositive motion.

2 MS. CAIOLA: Three to five, your Honor. We wouldn't
3 necessarily want to wait until the surveys were done.

4 THE COURT: Do you care?

5 MR. TOEWS: If the depositions take place before the
6 surveys are completed?

7 THE COURT: Right.

8 MR. TOEWS: I think some would probably need to be
9 completed after the surveys are done, but I think there are
10 other individuals that we have identified that could take place
11 while the surveys are being completed.

12 MR. KITZINGER: We don't know who the plaintiffs would
13 like to depose. So we don't know what the subject matter would
14 be.

15 THE COURT: Who do you want deposed?

16 MS. CAIOLA: We would like a 30(b)(6) to understand
17 the program services and activities that go on at each station.
18 We would like to know about assessments that have been done.
19 We would like to know how accessibility issues have been
20 handled. We haven't had enough discovery to even know yet who
21 would be in charge of these issues.

22 MR. TOEWS: We initially identified someone who I
23 believe would be the correct person for that type of
24 deposition, for a 30(b)(6) deposition, somebody who understands
25 the facilities.

1 There has been some turn over at the police
2 department. I believe it was Lieutenant DeQuatro who has since
3 left. I understand that he's retired. There is somebody new
4 in place. They're getting up to speed. Certainly we are
5 willing to produce somebody who is able to testify to the
6 programs and how the programs are offered and the facilities
7 themselves.

8 THE COURT: Do you think all that can be done while
9 the surveys are continuing before you have reports on the
10 surveys? I'm trying to figure out whether I give you one big
11 deadline or if there's a separate deposition deadline.

12 MR. KITZINGER: Personally for me, August is tough
13 because I handle all the election litigation for the city. All
14 of the litigation occurs in the month of August because the way
15 to win is to make sure you're the only one on the ballot in the
16 primary. That's when the litigation occurs. It's the first
17 two weeks in August are the Supreme Court. The following week
18 is the appellate division. The last week in August is the
19 Court of Appeals.

20 THE COURT: So the surveys have to be complete and
21 reports presented. You can tie up all the reports as well by
22 September 1?

23 MS. CAIOLA: If we're able to get the surveys in and
24 allow the expert time to get a report together.

25 THE COURT: Let me tell you something. Normally I do

1 not like to get this involved in discovery. Having to set how
2 many surveys can take place per week is not what I want to do.
3 Y'all have not given me a lot of confidence that you are going
4 to work well in the sandbox. So I'm going to set these
5 requirements. I would much prefer for you to work
6 collaboratively and collegially.

7 What's the maximum amount of surveys you could handle
8 in a week?

9 MS. KRUK: Could we do September 1 for all the surveys
10 and then the end of the month for the reports to be due?

11 THE COURT: I think I still need to set how many can
12 be done in a week.

13 MR. KITZINGER: I think at the beginning, it's likely
14 to be two a week max. As we work through and get the process
15 moving, I think we can get 25 done by September 1 without
16 difficulty.

17 THE COURT: I agree.

18 MR. KITZINGER: Of course, it depends on when they
19 identify the station house.

20 THE COURT: And the expert and the expert's
21 availability.

22 MR. KITZINGER: I think once we get rolling -- I think
23 it's going to start quite slowly, but I expect it to ramp up
24 such that we start with two a week for the first couple weeks
25 and then we will work out any issues and get at least three a

1 week done moving forward by July 1.

2 MS. CAIOLA: It really doesn't seem that we need more
3 than 12 weeks, some weeks doing more, some weeks doing less
4 than two or three a week. That would allow time for the expert
5 to get the report done.

6 THE COURT: So all the surveys have to be done by
7 September 1. You can't schedule more than two per week unless
8 the city agrees. All of the reports have to be done by the end
9 of September, which is the last working day is September 29.

10 MR. KITZINGER: Is that when it needs to be produced
11 to the other side?

12 THE COURT: Yes. The reports have to be produced.

13 Then fact depositions, fact discovery, depositions,
14 documents, everything needs to be done by the end of October.
15 That's October 31. I will see you again on November 3. Talk
16 at that point about whatever expert discovery needs to be taken
17 and a dispositive motions schedule.

18 MS. CAIOLA: Your Honor, will defendants be providing
19 an expert report as well?

20 MR. KITZINGER: To the extent we have a separate
21 expert. We assume everything is mutual.

22 THE COURT: Those dates are mutual. Correct.

23 MS. CAIOLA: And there should be no reason why we
24 can't move forward at any point in time we notice a deposition.

25 MR. TOEWS: I think it would depend on who the

1 individual is as Mr. Kitzinger said. I think it may be that
2 having some survey results would be useful for the purposes of
3 a deposition so we sort of understand what areas of the
4 precinct we're talking about, what the full level of
5 accessibility is, what programs are offered where.

6 MS. CAIOLA: We have a final deadline. Plaintiffs are
7 ready to start gathering evidence now in a 30(b)(6). That
8 would assist us.

9 THE COURT: Assist you in what?

10 MS. CAIOLA: Understanding all of the parameters of
11 the case.

12 THE COURT: So notice the deposition. If you think
13 it's premature, move to quash or call me and tell me that it's
14 premature, and I'll get you on the phone together, and we'll
15 discuss it.

16 MS. CAIOLA: Thank you, your Honor.

17 MR. KITZINGER: Thank you, your Honor.

18 THE COURT: Try to phase the discovery in the most
19 efficient way possible.

20 MR. TOEWS: We will. Thank you.

21 THE COURT: If, however, the parties want to
22 reconsider this approach and figure out a way to get it more
23 quickly teed up, I would be happy to consider that.

24 That's directed at you. Again, let me stress that if
25 this case gets settled, I'm the one that approves attorneys'

1 fees.

2 MS. CAIOLA: Understood, your Honor.

3 THE COURT: Anything further?

4 MS. CAIOLA: No, your Honor.

5 (Adjourned)

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